No. 925

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, PETITIONER

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decision of the Supreme Court of Appeals of Virginia in the above-entitled case, which denied priority to certain claims of the United States over the claim of a landlord for rent.

OPINIONS BELOW

The opinion of the Corporation Court of the City of Danville, Virginia (R. 26–34) is unreported. The opinion of the Supreme Court of Appeals of Virginia (R. 36–44) is not yet officially reported.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered January 24, 1944.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that the decision below denied a title, right, privilege, or immunity claimed by the United States under Section 3466 of the Revised Statutes of the United States. The cases relied upon to sustain the jurisdiction of this Court are *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Emory*, 314 U. S. 423; and *United States* v. *Texas*, 314 U. S. 480.

The court below held that in a state proceeding under an assignment for the benefit of creditors, a debt due the United States was not entitled to priority in payment out of the proceeds of the debtor's property, over a landlord's claim for six months' rent due and to become due, on the ground that a state statute conferred upon the landlord a specific and perfected lien on the debtor's property. The United States contends that under Section 3466 of the Revised Statutes, the debt due the Federal Government is entitled to priority over the landlord's claim.

The United States filed claims with the trustee under the general deed of assignment, asserting its right under R. S. 3466 to priority over the landlord's claim for rent and also over the claim of the City of Danville for taxes (R. 11–12). It raised this federal question in the Corporation Court of the City of Danville by its answer in

this suit brought by the trustee to have the rights of priority of several claimants determined (R. 24–25); in its petition for appeal to the Supreme Court of Appeals of Virginia (R. 1–8); and in its brief and oral argument before that court. Both the Corporation Court of the City of Danville (R. 26–34) and the Supreme Court of Appeals of Virginia (R. 36–44) considered and passed upon this Federal question, specifically denying the United States the asserted priority over the claim of the landlord.

The question presented is one of substance (*New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Emory*, 314 U. S. 423; *United States* v. *Texas*, 314 U. S. 480), as is more fully developed under the reasons for granting the writ, *infra*, pp. 7–12.

QUESTION PRESENTED

Whether, in a state proceeding under an assignment for benefit of creditors, a landlord's lien for six months' rent due and to become due and a lien of a municipality for unpaid taxes, both created by state law, take precedence in payment over a debt due the United States, the prior payment of which is directed by Section 3466 of the Revised Statutes.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

On June 19, 1941, Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, Danville, Virginia, executed a general deed of assignment to a trustee for the benefit of creditors. The property conveyed specifically included all personal property, fixtures, and equipment located on the premises used by the assignor in the conduct of the restaurant business (R. 15–16, 26–27). This personal property was duly sold by the trustee and there remained after the deduction of appropriate administration expenses the sum of $1,407.29 (R. 28).

Aside from debts due to general creditors, the assignor owed the following debts, all of which were asserted to be entitled to priority in payment: (1) The United States, $1,559.63, plus interest;[1] (2) Virginia Unemployment Compensation Commission taxes for 1940 and 1941, $66.38 plus interest; (3) City of Danville personal property taxes for 1939–1941, $300.55; and (4) Waddill, Holland & Flinn, Inc., six months' rent due and to become due, $1,500 (R. 27–28).

Assignor's place of business was leased from Waddill, Holland & Flinn, Inc., for a period of 5

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[1] The debt due the United State comprised the following items: Federal Unemployment Compensation taxes for the year 1940, $209.30; like taxes for the year 1941, $71.70; and a debt arising out of a Federal Housing Administration transaction, $1,278.63 (R. 27). No dispute exists as to the correctness of these amounts or that they were due and owing when the assignment was made.

years beginning January 1, 1937, at a monthly rental of $250 (R. 27). On July 1, 1941, twelve days after the deed of assignment was executed, the landlord issued a distress warrant for 3 and ⅔ months' past-due rent amounting to $850, and levied the same on the property of the assignor located on the leased premises (R. 22, 27). On July 2, 1941, the landlord issued and levied on the same property an attachment for future installments of rent for 2 and ⅔ months in the sum of $650 (R. 22, 28). On July 2, 1941, the City Collector of Danville distrained all of the property on the leased premises for taxes due from the assignor to the City of Danville for the years 1939–41, consisting of taxes totalling $226.81 on the furniture, fixtures, and merchant's capital of the restaurant, and other personal-property taxes totalling $74.64 (R. 28).

On April 20, 1942, the trustee filed a petition in the Corporation Court of Danville, Virginia, reciting that the United States, the State of Virginia, the City of Danville, and the landlord all claimed priority of payment from the proceeds in his hands as trustee, and he requested advice as to the proper distribution to be made of the funds (R. 9–13). The landlord answered, stating that it claimed priority over all other claims against the funds, "by virtue of the levy of said attachment and distress warrant" against the property of the assignor on the leased premises (R. 22).

The Unemployment Compensation Commission of Virginia, an instrumentality of the Commonwealth of Virginia, answered, admitting the priority of the United States but claiming priority over the claim of the landlord (R. 23–24). The United States answered, claiming priority over all other claims (R. 24–25). On January 5, 1943, the Corporation Court of Danville entered judgment, holding that the landlord was entitled to priority over the claims of the United States and of the Unemployment Compensation Commission of Virginia, but that its claim was subordinate to that of the City of Danville for taxes (R. 34–35). On appeal, the Supreme Court of Appeals of Virginia affirmed the landlord's priority over the United States and the State Commission. Since the rent claim completely exhausted the fund, the court did not decide whether the City's tax claim, held to be prior to the rent claim, would be prior to the claim of the United States or the State Commission in the absence of the rent claim. (R. 36–44.)

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Appeals of Virginia erred:

(1) In holding that under R. S. 3466, a debt due the United States is subordinate in payment to a landlord's claim for rent which under Virginia law is secured by a lien upon the debtor's property.

(2) In holding that a landlord's lien for rent under Virginia law upon personal property on the leased premises, even without levy of a distress or attachment, entitles the landlord to priority out of the proceeds of such property, as against a debt due to the United States.

(3) In failing to hold that under R. S. 3466 and this Court's decision thereunder, the debt due the United States is entitled to priority over the claim of the landlord for rent and the claim of the City of Danville for taxes.

REASONS FOR GRANTING THE WRIT

Section 3466 of the Revised Statutes provides that "the debts due to the United States shall be first satisfied" whenever any person indebted to the United States is insolvent or "not having sufficient property to pay all his debts, makes a voluntary assignment thereof" (see Appendix, *infra*, p. 13). It is common ground in the instant case that the debtor, not having sufficient property to pay all her debts, made a voluntary assignment of her property for the benefit of creditors. It is likewise not in question that the claim of the United States is one covered by the preference provided for in R. S. 3466.

While recognizing that the right to priority under R. S. 3466 is to be determined as of the date of the assignment (*United States* v. *Texas*, 314 U. S. 480, 486; *New York* v. *Maclay*, 288 U. S.

290), the court below held that a landlord under Virginia law has a "fixed and specific" lien for six months' rent against all the property of the tenant located on the leased premises, irrespective of attachment or distraint; that the trustee took the property subject to that lien, which continued to attach to the proceeds of the property; and that the landlord was entitled to payment out of such proceeds ahead of the United States. It further held that the claim of the City of Danville for taxes was prior to the landlord's claim as a matter of Virginia law, but found it unnecessary to determine whether the City's claim was superior to that of the United States since the landlord's claim would exhaust all available funds. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 91, with *Ferris* v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232. We submit that the court below has decided an important question of federal law in a manner which conflicts with the decisions of this Court in *New York* v. *Maclay*, 288 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480. Both of these cases rejected liens similar to that of the landlord under Virginia law, as a basis for subordinating the claim of the United States under R. S. 3466.

The *Maclay* case involved a contest for priority between a debt due the United States and the New York corporate franchise tax which by

state statute was made a lien upon all real and personal property of the corporation, superior, as a matter of state law, to existing mortgages. *New York Terminal Co. v. Gaus,* 204 N. Y. 512, 514; cf. *Marshall* v. *New York,* 254 U. S. 380, 383–384. This Court held that even though the lien, as a matter of state law, bound the property in the hands of subsequent purchasers, it was uncertain in amount and "not so perfected or specific as to change the rule of distribution" (288 U. S. at 292). Thereafter, in *Matter of Lincoln Chair & Novelty Co.,* 274 N. Y. 353, the contest was between the United States and a state tax whose amount had been definitely ascertained and liquidated prior to the time when the priority of the United States attached. The New York Court of Appeals held, however, that since no specific property had been seized or appropriated to the satisfaction of the tax or set apart from the general property of the debtor, the state tax lien still remained general and unperfected, and could not defeat the right of the United States to priority under R. S. 3466 (274 N. Y. 358).

In *United States* v. *Texas,* 314 U. S. 480, the contest for priority was between a claim of the United States and that of the State of Texas for gasoline taxes. Under the state statute, which had been drawn specifically to create a paramount

perfected lien for such taxes, the Supreme Court of Texas had held that the lien was superior to all other liens, regardless of their nature (*State* v. *Wynne*, 134 Tex. 455, 469), and was not dependent upon levy or attachment for its existence (at p. 471). This Court nevertheless held that the tax lien so created was inferior to the claim of the United States since the state law "did not of its own force divest the taxpayer of either title or possession" (314 U. S. at 488).[2]

The lien created by Virginia law in the instant case does not purport to divest the debtor of either title or possession. The Virginia statute enables a landlord to levy a distress for six months' rent upon "any goods of the lessee * * * found on the premises" or removed therefrom not more than 30 days prior to the distress; and the goods of the tenant on leased premises may not be removed by any lienor or transferee after commencement of the tenancy, nor taken under legal process, without first paying or securing the landlord for six months' rent in arrears or to become due. Virginia Code, Secs. 5519, 5522, 5523, 5524 (*infra*,

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[2] This criterion of the Government's right to priority may be traced back to *Beluss*on v. *Smith*, 2 Wheat. 396, 425, where this Court said that the right of the United States to be first satisfied out of a debtor's funds applied to all his property except only such as had been transferred to a third person, mortgaged to secure a debt, or secured under a *fi. fa.* and so divested out of the debtor that it would not be subject to the claim of the United States for priority.

pp. 13–16). Here the distraint and attachment were not levied by the landlord until after the deed of assignment had been executed, and while the court below held that the lien existed independent of distress or attachment, it was not considered sufficiently "fixed and specific" to override the general lien of the City of Danville for taxes (R. 38).[3] The landlord's lien conferred by Virginia law does not appear to differ essentially from the statutory lien for corporation license taxes considered by this Court in *New York* v. *Maclay*, 288 U. S. 290, or from the lien for gasoline taxes involved in *United States* v. *Texas*, 314 U. S. 480, neither of which was deemed sufficient to override the priority accorded to the United States by R. S. 3466.

It is of course not sufficient that the court below considered the landlord's lien a "specific and perfected" lien under state law. For the states are without power to establish a priority in conflict with that prescribed by R. S. 3466. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260. The question is

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[3] After the decision of this Court in *United States* v. *Texas*, 314 U. S. 480, the Supreme Court of Washington, in *Spokane Merchants' Ass'n* v. *State*, 15 Wash. (2d) 186, 190, held that actual levy or attachment was necessary to make a state tax superior to the priority conferred upon debts due the United States by R. S. 3466, thereby overruling *sub silentio* its prior decision in *Ernst* v. *Guarantee Millwork, Inc.*, 200 Wash. 195, relied upon by the court below (R. 39).

not whether rent claims "are statutory liens of some sort, but whether they are such liens as the courts of the United States have recognized as entitled to priority over claims due the government." *New York* v. *Maclay*, 58 F. (2d) 979, 981 (C. C. A. 2), affirmed 288 U. S. 290; cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176. Nor is it material that under state law the landlord's lien may relate back to the beginning of the tenancy (R. 44). The "doctrine of relation will not divest the United States of the preference that accrued when" the assignment was made. Cf. *New York* v. *Maclay*, 288 U. S. 290, 293.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 21, 1944.

APPENDIX

Section 3466 of the Revised Statutes of the United States (31 U. S. C. 191) provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Virginia Code of 1936 provides:

> § 5519. REMEDY FOR RENT AND FOR USE AND OCCUPATION.—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefor be non-suited, but may use the same as evidence of the amount of his debt or damages. In any

action for rent, or for such use and occupation, interest shall be allowed as on other contracts. (Code 1887, § 2787.)

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§ 5522. WHEN AND BY WHOM DISTRESS MADE.—Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff, or sergeant of the county or city wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed. (Code 1887, § 2790; 1902-3-4, p. 664.)

§ 5523. ON WHAT GOODS LEVIED.—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress, but for not more than six months' rent if

the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming, or agriculture, and for not more than twelve months' rent if the lands or premises are used for farming or agriculture whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section, nor shall the goods of the undertenant be liable to a greater amount than such undertenant owed the tenant at the time the distress was levied. (Code 1887, § 2791; 1922, p. 863; 1932, p. 696.)

§ 5524. WHEN GOODS NOT TO BE REMOVED WITHOUT PAYING SIX MONTHS' RENT; LIEN FOR TAXES, LEVIES, AND MILITIA FINES NOT AFFECTED.—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farm-

ing or agriculture, and not being more altogether than twelve months' rent, if the lands or premises are used for farming or agriculture. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.

For the purpose of this act a monthly or weekly tenancy shall not be construed as a new lease for every month or week of occupation of the premises by the tenant, but his tenancy shall be considered as a continuance of his original lease so long as he shall continue to occupy the property without making any new written lease. (Code 1887, § 2792; 1922, p. 863; 1932, p. 696.)

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